Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
NATIONWIDE PROGRAMMATIC	)	
AGREEMENT REGARDING THE	)	WT Docket No. 03-128
SECTION 106 NATIONAL HISTORIC	)	
PRESERVATION ACT REVIEW PROCESS	)	

To: The Commission

JOINT COMMENTS OF WESTERN WIRELESS CORPORATION AND T-MOBILE USA, INC.

Gene A. DeJordy, Esq.
Vice President of Regulatory Affairs
Western Wireless Corporation
3650 – 131st Ave., S.E., Suite 400
Bellevue, WA 98006
(425) 586-8700

Thomas J. Sugrue, Esq.
Vice President - Government Affairs
T-Mobile USA, Inc.
401 9th Street, N.W.
Suite 550
Washington, DC 20004

William J. Hackett, Esq.
Director of Regulatory Compliance
Western Wireless Corporation
401 9th Street, N.W., Suite 550
Washington, DC 20004
(202) 654-5980

Dan Menser, Esq.
Senior Corporate Counsel
T-Mobile USA, Inc.
12920 S.E. 38th Street
Bellevue, WA 98006-1350
(425) 378-4000

John F. Clark, Esq.
Zachary A. Zehner, Esq.
Keith R. Murphy, Esq.
Perkins Coie, LLP
Counsel to T-Mobile USA, Inc., and
Western Wireless Corporation
607 Fourteenth Street, N.W., Suite 800
Washington, DC 20005-2011
(202) 434-1637

Shannon Reilly, Esq.
Corporate Counsel
T-Mobile USA, Inc.
12920 S.E. 38th St.
Bellevue, WA 98006
(425) 378-4000

Dated: August 8, 2003

CONTENTS

Western Wireless Corporation ("Western Wireless") and T-Mobile USA, Inc. ("T-Mobile USA," formerly VoiceStream Wireless Corporation) (collectively "Joint Commenters") hereby submit joint comments in support of the Notice of Proposed Rulemaking ("*NHPA Notice*") addressing the draft nationwide programmatic agreement ("Draft NPA") for historic preservation review of Federal Communications Commission ("FCC" or "Commission") undertakings under Section 106 of the National Historic Preservation Act ("NHPA").[1]

These comments address issues of specific and significant concern to the Joint Commenters and are therefore limited in scope. With respect to all other issues relating to the Draft NPA, Joint Commenters support the comments of the Cellular Telecommunications & Internet Association ("CTIA") filed in this proceeding.

Introduction and Summary

The recent release of the *NHPA Notice* and the Draft NPA marks a watershed in the Commission's continuing effort to assure the protection of historic properties. Indeed, the Draft NPA represents a key element of Chairman Powell's "Environmental and Historic Preservation Action Plan," which recognizes the importance of deploying communications services consistent with the NHPA and the National Environmental Protection Act ("NEPA").[2] The Joint Commenters applaud and fully support the Commission's efforts in this regard.

Joint Commenters have substantial experience with the intricacies of the NHPA Section 106 process, as Western Wireless has to date deployed over 1300 wireless

---

[1] *See* Notice of Proposed Rulemaking, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, FCC 03-125 (rel. June 9, 2003) ("*NHPA Notice*").

[2] *See* "Environmental and Historic Preservation Action Plan – Statement by FCC Chairman Michael K. Powell," May 1, 2003, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-234001A1.pdf ("*Powell Action Plan*").

communications facilities and T-Mobile has deployed 20,344 facilities nationwide. Joint Commenters have expended extensive resources to protect historic properties and meet their environmental obligations while building out their wireless infrastructure.

As members of the Telecommunications Working Group ("TWG"), Joint Commenters, along with representatives of the wireless industry and others, have committed significant time, effort and resources to develop the Draft NPA.[3] Joint Commenters wholly support the stated goal of the Draft NPA to "tailor and streamline procedures for review" under Section 106,[4] but believe that this "streamlining" effort should remove and improve, not add to or complicate, the regulatory burdens on the wireless industry. Although the Draft NPA effectively streamlines the Section 106 process in many ways, additional revisions and modifications are required to meet the goals of removing unnecessary regulatory burdens and properly focusing the efforts of SHPOs on only the projects most likely to impact historic properties.

The Joint Commenters urge the Commission to make changes to the proposed Draft NPA in five important areas. First, the Commission should standardize the

---

[3] The TWG was originally formed by the Advisory Council on Historic Preservation ("ACHP") in August of 2000 and was made up of the following groups: (1) representatives from government, including the FCC, the ACHP, the National Conference of State Historic Preservation Officers ("NCSHPO"), and individual State Historic Preservation Officers ("SHPOs"), notably those from Delaware, Ohio, Vermont, Arkansas, Arizona, Massachusetts, Georgia, Washington, and North Carolina; (2) tribal representatives, including the National Association of Tribal Historic Preservation Officers ("NATHPO") the Council of American Indians, and representatives from individual tribes, including the Navajo Nation and others; (3) the wireless telecommunications, telecommunications infrastructure and broadcast industries, including representatives from the trade associations Cellular Telecommunications and Internet Association ("CTIA"), PCIA, and the National Association of Broadcasters ("NAB"), and individual companies including Nextel, AT&T Wireless, Verizon Wireless, American Tower Company, Crown Castle, SBA, and Alltel; (4) the National Historic Trust; and (5) representatives of the cultural resources consulting industry, including the trade association American Cultural Resources Association ("ACRA") and individual companies such as EBI and URS Dames and Moore.

[4] *NHPA Notice* ¶ 1.

timeframes during which various parties are required to respond in the Section 106 review process. Second, the Joint Commenters urge the Commission to make reasonable provision for notice and participation by the public and by public interest groups. Third, Joint Commenters support the exclusion of certain undertakings from Section 106 review and suggest slight revisions to the six exclusions proposed in the Draft NPA. Fourth, Joint Commenters recommend clarification and reform of the criteria and practices for assessing visual effects under Section 106. Fifth, Joint Commenters recommend certain revisions to the procedures for submitting SHPO "request for concurrence" packets.

Discussion

I. Timeframes For Review Must Be Fixed, Clear and Fairly Enforced

A. A Firm 30-Day Review Period Should Apply to All SHPO/THPO Reviews

The timeframes for review under Section 106 are of vital importance to the wireless industry. Unnecessary delays in the review process harm competition and impair the expansion and capacity of wireless networks and, thereby, the service that carriers are able to provide to the public. Fortunately, the time frames in the Draft NPA, consistent with those in the rules of the ACHP, clarify the role of applicants and their consultants while streamlining, standardizing, and expediting the review process. Most important, the timeframes require parties to act with reasonable promptness. It is essential to the goals of the NPA and this proceeding that these time frames be applied and enforced uniformly and fairly.

Joint Commenters strongly support the provision in the Draft NPA establishing that a Section 106 review will be deemed complete if an applicant has proposed a finding of "no historic properties affected" and the SHPO does not respond within 30

days.[5] This provision is consistent with the rules of the ACHP, which provide "[i]f the SHPO/THPO . . . does not object within 30 days of receipt of an adequately documented finding [of no historic properties affected], the agency official's responsibilities under section 106 are fulfilled."[6] Indeed, after lengthy discussion and consideration, the ACHP established the 30-day period as the presumptively reasonable length of time for Section 106 review. This critically important 30-day period should also apply, as it does under the ACHP rules, to objections to findings of no adverse effect by consulting parties, including Indian tribes.[7]

Although the 30-day review period has been part of the ACHP rules for 15 years, neither the Commission nor the ACHP have been willing to enforce this clear deadline. The Joint Commenters have found that some SHPOs, often without explanation or justification, hold their responses to submissions from FCC applicants for periods of up to 90 days or longer. When these delays occur, the construction schedules for the proposed facilities are often seriously disrupted, depriving wireless users of critical service and causing irreparable harm to the affected carrier. When multiplied over hundreds or even thousands of towers, this unnecessary impediment to providing wireless service has far-reaching, negative effects on consumers and carriers alike. Moreover, the lack of enforcement of the 30-day review period undermines industry's reasonable reliance on this provision and, in turn, its confidence in the Commission's regulatory processes relating to wireless communications facilities.

---

[5] Draft NPA at Section VII.B.2.

[6] *See* 36 C.F.R. § 800.4(d)(1).

[7] *See* 36 C.F.R. § 800.5(c)(1) ("Failure of the SHPO/THPO to respond within 30 days from receipt of the finding [of no adverse effect] shall be considered agreement of the SHPO/THPO with the finding.").

Consistent with Chairman Powell's has commitment to "enforce the rules swiftly and effectively to create incentives for parties to follow the required processes[,]"[8] Joint Commenters strongly urge and support strict enforcement of the Draft NPA's review periods and time limits. Joint Commenters also support holding all parties, including SHPOs/THPOs and applicants, equally accountable for meeting applicable time frames. Accordingly, the Joint Commenters urge the Commission to retain the 30-day review period for findings of "no historic properties affected" and "no adverse effect" and commit to strict enforcement of this deadline.[9]

In addition, the Joint Commenters strongly support applying this 30-day review procedure to findings of "no adverse effect."[10] There is no logical or legal justification for applying a different procedure in cases of a SHPO's failure to respond to findings of no effect than in cases of findings of no adverse effect. As currently drafted, however, applicants must wait for a decision from the Commission regarding the finding of "no adverse effect" if a SHPO fails to respond for 30 days.[11] This additional period of review adds needless delays to the Section 106 process and is inconsistent with the rationale underlying the 30-day period of review.

Under the ACHP rules, reasonable findings of no effect by applicants and their professional consultants should be deemed sufficiently credible to end the Section 106 review in the absence of SHPO response. Nothing in the ACHP rules requires

---

[8] *See Powell Action Plan* at 1.

[9] *See* Draft NPA at Section VII.B.2. and VII.C.3.

[10] The Advisory Council rules articulate no practical difference between "no effect" and "no adverse effect" determinations. *See* 47 C.F.R. §§ 800.3(c)(4), 800.4(d)(1), 800.5(c); *see also* Memorandum, *30-day Review Periods in the Section 106 Process*, from John Fowler, Executive Director, ACHP, to Federal Preservation Officers, SHPOs, THPOs (April 3, 2001) (making no distinction between "no effect" and "no adverse effect" determinations).

[11] *See* Draft NPA at Section VII.C.2.

additional Commission review of findings of "no adverse effect" by the same applicant or professional consultant. The same efficient process should apply to both "no effect" and "no adverse effect" findings. Some TWG participants argued that because Section 106 requires agencies to "consider" effects from undertakings, where "effects" of any kind are found, the FCC must actually review them. This argument fails mainly because Section 214 of the NHPA gives the ACHP authority to exempt undertakings from any provision of the NHPA. Therefore, the Draft NPA can validly exclude both findings of "no adverse effect" and findings of "no effect."

If the Commission opts not to apply the same standard to findings of "no historic properties affected" and "no adverse effect," it should, at a minimum, modify the current Section VII.C.2 to establish a specific, reasonable time within which the Commission must complete its review (*e.g.*, 10 days). Without an established, fixed period within which a review must be completed, applicants will continue to face substantial uncertainty that will delay or jeopardize investment decisions and potentially deprive consumers of wireless service.

B. Standard Time Frames for Review Must Apply to Tribal Participation

The need for certainty in the time frames that govern Section 106 review applies with equal force to tribal consultations. While Joint Commenters recognize the importance of open and meaningful tribal participation in the Section 106 consultation process, it is an unfortunate reality that a majority of the delayed and extra-time responses that Joint Commenters receive are from tribes. The Joint Commenters support allowing extra time for tribal participation and, accordingly, are proposing three weeks of additional time for tribes to respond. This amount of additional time reasonably balances the public interests of accommodating tribal participation with the interest in providing wireless carriers with the certainty and

procedural promptness they need to invest in wireless communications facilities. With these interests in mind, Joint Commenters must stress the importance of making the timeframes for tribal participation clear, firm, and certain.[12]

Alternative A to Section IV requires that applicants notify relevant tribes prior to sending the Submission Packet to the SHPO/THPO,[13] and provide the representative of these tribes a "reasonable opportunity" to respond before submitting the Submission Packet to the SHPO/THPO.[14] The NPA states that normally, 30 days is reasonable, but circumstances may necessitate extensions.[15] To avoid the difficult and expensive delays often experienced by Joint Commenters, this somewhat open-ended timeframe should be replaced with a firm 21-day response period, beginning on the day the tribe receives the initial communication. Joint Commenters submit that requiring a tribe to respond to an Applicant's initial notice within 21 days is reasonable considering that tribes will also have 30 days to review an applicant's Submission Packet, for a total of 51 days of review. Incorporating this firm 21-day response period will provide necessary certainty and streamlining of this aspect of the consultation process.

II. The NPA Should Contain Reasonable Provisions for Public and Interest Group Notice

Joint Commenters support the Commission's clarification in Section V.B. of the Draft NPA that written notice must be provided to the public for each planned

---

[12] *See* Introduction to Revised ACHP Rules, 65 Fed. Reg. 77698, 77703 (rel. Dec. 12, 2000) (recognizing that consulting parties should not be able to stop the Section 106 review process for failing to respond.).

[13] *See* Draft NPA at Section IV.E, Alternative A.

[14] *See* Draft NPA at Section IV.F, Alternative A.

[15] *Id.*

undertaking.[16] Public comments regarding these planned undertakings, however, should be limited according to the procedures for public comments and objections set out in Section XI.

Joint Commenters also support the Commission's clarification in Section V.A. that applicants must notify local governments of a planned undertaking.[17] This clarification is consistent with rules of the ACHP.[18] In most cases, local governments are intimately involved in the local permitting of a planned undertaking and, therefore, should already be aware of the historic review aspects of the undertaking. Joint Commenters concur with the suggestion of Verizon, the Ohio SHPO and NCSHPO that the Draft NPA should specify a defined period for local government response.[19] The procedures for such a response, however, should be governed by Section XI of the Draft NPA.

Finally, Section V.D, which permits SHPOs to provide lists of groups that "should be provided notice," should be rejected, since it is uncertain on its face, unduly burdensome, and is broader than, and duplicative of, the rules of the ACHP.[20] If this rule were adopted, an applicant would be unsure as to which group on this list it must, rather than "should," provide notice. Section 800.2(d)(2) of the ACHP rules requires only that the FCC "provide the public with information about an undertaking and its effects on historic properties and seek public comment and input."[21] If certain

---

[16] Draft NPA at Section V.B.

[17] Draft NPA at Section V.A.

[18] *See* 36 C.F.R. § 800.3(f)(1).

[19] Draft NPA at Section V.F., Note 10.

[20] Draft NPA at Section V.D.

[21] 36 C.F.R. § 800.2(d)(2).

groups have an interest in planned undertakings in a specific area, they will certainly be vigilant in monitoring the SHPO-provided project notice: the applicant should not be burdened with identifying and notifying local interest groups. Also, Section V.D. already reflects a sufficiently broad notice obligation by requiring applicants to provide notice to the public generally of each planned undertaking.

III. Exclusions Must Be Practical and Useable

The exclusion from Section 106 review of certain projects is expressly permitted under the rules of the ACHP and advances the important streamlining goal of regulating only when needed to protect historic resources.[22] Moreover, because the vast majority of Section 106 tower reviews produce findings of no effect or no adverse effect,[23] progress toward this goal will ensure that the limited compliance-related resources available to both federal and state regulators are available for the small number of communications projects that truly have a significant effect on historic properties.

To further these goals, the exclusions adopted in the programmatic agreement must be made as practical and user-friendly as possible. They must be clear, easy to understand and apply, objective, and above all, self-executing. Excluded undertakings

---

[22] Section 214 of the NHPA grants the ACHP authority, with the concurrence of the Secretary of the Interior, to promulgate regulations "under which Federal programs or undertakings may be exempted from any or all of the requirements of [the NHPA]." 16 U.S.C. § 470v. The ACHP exercised this authority in promulgating ACHP Rule 800.14(c), which permits the FCC to exempt any undertaking from Section 106 review, provided three criteria are met: (i) the action qualifies as an undertaking; (ii) the potential effects upon historic properties are foreseeable and likely to be minimal or not adverse; and (iii) the exclusion is consistent with the purposes of the NHPA. 36 C.F.R. § 800.14(c).

[23] In a 2002 meeting of the TWG, the Ohio SHPO reported on a survey that more than 97% of Section 106 reviews of communications towers in that state resulted in findings of no effect. Other SHPO staff reported similar rates of Section 106 review without adverse effect findings in their states.

should never require Commission or SHPO consultation or the application of subjective tests.

Regarding the exclusions in Section III of the Draft NPA, as an initial matter, the Commission should recognize that modifications to towers do not constitute undertakings under the NHPA. The relevant provision of the NHPA, for purposes of the Draft NPA, states that only activities that "requir[e] a Federal permit, license or approval" are undertakings.[24] Tower modifications that do not involve collocations do not require Commission licensing or approval and are clearly not undertakings. As such, this should be made clear in the Draft NPA and removed from the exclusions section (Section III.A.1).

Except in connection with the Navajo Nation's proposed Alternative Section III.B (see discussion below), the replacement tower (Section III.A.2), temporary facility (Section III.A.3)[25] and SHPO designation (Section III.A.6)[26] exclusions are the subject of consensus agreement by the TWG and should be retained without revision. The industrial area (Section III.A.4) and corridor (Section III.A.5) exclusions should be retained with minor revisions as set forth below.

The industrial area exclusion was rewritten several times by the TWG, resulting in verbose and confusing wording. This exclusion should be simplified to

---

[24] *See* 16 U.S.C. § 470(w)(7) (defining federal undertaking as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including – (A) those carried out by or on behalf of an agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval; and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.")

[25] Joint Commenters encourage the Commission to clarify the scope of the temporary facility exception. Specifically, the Commission should make clear that the exclusion applies to all facilities intended by the applicant to be temporary, even if the structure is intended to remain standing for more than 2 years.

[26] Joint Commenters note that the provision allowing SHPOs to designate exclusion areas lacks the appropriate incentive for its use.

ensure that applicants are able to implement it effectively and efficiently. The corridor exclusion should be revised to apply to all high-speed, controlled access highways, not just interstate highways, because they share the same physical characteristics and will be visually impacted in the same manner. For the same reason, the corridor exclusion should be revised to apply to all rail lines in active use, not just passenger lines. In addition, Joint Commenters urge the Commission to reject the NCSHPO "opt out" proposal for the corridor exclusion.[27] Permitting SHPOs to "opt out" of the exclusion on a statewide basis will undermine the streamlining objectives of the Draft NPA.

IV. The Commission Must Clarify the NPA's Approach To Visual Effects

Joint Commenters are acutely aware of the need for clarification and reform of the assessment of visual effects under Section 106 of NHPA. In fact, the Joint Commenters have found that a majority of SHPO's "adverse effect" determinations are based purely upon visual effects, rather than direct physical effects. Furthermore, different SHPOs often utilize subjective and varying interpretations of the presumed area of potential effect ("APE"), creating significant uncertainty that hinders carriers' ability to deploy their networks.

Western Wireless recently responded to a Notice of Apparent Liability ("NALF") issued by the Commission, which proposed the assessment of a $200,000.00 forfeiture and alleged violations of the Commission's environmental rules. Specifically, this NALF, the first of its kind, asserts that Western Wireless is operating a cellular site without proper authorization because, *inter alia*, the site allegedly has an adverse effect on a series of historic properties (all located over one

[27] Draft NPA at Section III.A.5 n.5.

quarter mile away and up to 1½ miles away, and none with noteworthy historic settings that encompassed the tower site), and the licensee did not submit an Environmental Assessment to the Commission or await preparation of an Environmental Impact Statement prior to constructing the tower.[28]

For its part, T-Mobile has recently submitted a request to the Commission for resolution of a dispute with a SHPO concerning the alleged visual effects of a proposed facility to be located along a historic parkway that was approved by the local zoning board over eighteen months ago.[29]

As these experiences have demonstrated, disputes regarding assertions of visual impact often result in substantial deployment delays, and dissipate the scarce historic-preservation compliance resources of the regulated industry as well as those of state and federal regulators. To ensure a just and effective Section 106 review process, Joint Commenters strongly urge the Commission to refine and/or clarify its approach to visual effects. The Commission should also revise the presumed APE proposed in the Draft NPA because it is not acceptable to industry for the reasons discussed below. Finally, any clarifications made by the Commission in this area should not only apply prospectively to this agreement, but also to Section 106 reviews currently pending before SHPOs, Indian tribes and the Commission.

---

[28] Notice of Apparent Liability, *Western Wireless Corporation and WWC Holding Co., Inc., Licensee of Cellular Radio Station KNKN343, CMA583A – North Dakota 4 – McKenzie RSA*, File No. EB-020TS-659, FCC 03-109 (rel. May 12, 2003). WWC Holding Co., Inc. is a wholly-owned subsidiary of Western Wireless Corporation.

[29] *See* Letter from T-Mobile USA, Inc. to Dan Abeyta, Wireless Telecommunications Bureau, regarding Bardonia Site in Clarkstown, NY (FCC Reference No. 2003000748) dated June 19, 2003.

A. Aesthetic Effects Are Not Section 106 Visual Effects

Historic preservation regulators often mistake purely aesthetic effects for "visual effects" under Section 106. To fully appreciate the distinction between these effects, it is necessary to examine both the ACHP's rules and authoritative guidance provided by the National Register of Historic Places ("National Register"). Specifically, the ACHP's rules explain that an "effect" occurs when an undertaking alters any of the characteristics qualifying a historic property for inclusion in the National Register. These characteristics include the four aspects of significance[30] and seven aspects of historic integrity: (1) location, (2) design, (3) setting, (4) materials, (5) workmanship, (6) feeling, or (7) association. Thus, for a property to qualify for the National Register, it must (1) be associated with an important historic context; and (2) it must retain the historic integrity of those features necessary to convey the property's significance.[31]

Under the ACHP rules, an adverse effect occurs when an undertaking alters one of these characteristics in a manner that diminishes one or more of the seven aspects of a historic property's historic integrity.

---

[30] The Department of Interior defines the four criteria for evaluation in the National Register as follows: "The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and: A. That are associated with events that have made a significant contribution to the broad patterns of our history; or B. That are associated with the lives of persons significant in our past; or C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or D. That have yielded, or may be likely to yield, information important in prehistory or history." United States Department of the Interior**,** National Park Service, National Register Bulletin 15, " How to Apply the National Register Criteria for Evaluation," at 2 (Revised 1997), *available at* http://www.cr.nps.gov/nr/publications/bulletins/nrb15/, (Revised for the Internet, 1995).

[31] *Id*. at 3.

Accordingly, for an effect or adverse effect to occur, there must be a link between an undertaking and the alteration, either directly or indirectly, but always physically, of at least one or more eligibility characteristics of a historic property. A tower that does alter a qualifying characteristic, but is nonetheless visible from a historic property, may, in fact, generate aesthetic effects that impact a particular viewer's tastes, moods, and sensibilities, but it cannot cause an adverse visual effect under Section 106.

Visual effects from a tower alone do not alter a property's location, design, workmanship, materials, or its association with a historic event or person, therefore, for Section 106 review purposes, that leaves only assessment of the impact of the tower on the integrity of the property's setting or feeling. According to the National Register, the evaluation of integrity "must always be grounded in an understanding of a property's physical features and how they relate to significance."[32]

Applying this guidance, to find an effect one must determine whether the visual impact of a proposed tower may affect the physical characteristics of a property's setting or feeling[33] or otherwise affect the features of the property in a way that prevents the property from conveying its historic significance.

B. The Appropriate Consideration of Visual Effects Under Section 106 Involves a Limited APE

As indicated above, the integrity of physical features of a historic property must be altered or diminished for a Section-106 adverse effect. Accordingly, the footprint is the logical presumed APE for any proposed communications facilities.

---

[32] *Id*. at 44.

[33] The National Register guidance explains that a property's feeling "results from the presence of physical features that, taken together, convey the property's historic character[,]" while "setting" involves the property's "relationship to surrounding features and open space." *Id.* at 44-45.

In rare cases, a project located outside the boundary of a historic property may, in a limited way, visually alter a property in a manner that prevents conveyance of the property's historic significance. For instance, where a property's qualifying characteristic is feeling (i.e., the ability to evoke a feeling of a particular time and place), an adjacent tower blocking the only vantage point of such a property may create an effect.

For the most part, however, the APE would take into account almost all possibilities of physical alteration to the historic property. To account for rare cases, the area immediately beyond the footprint, such as a radius of a hundred yards, might be included in the APE.

Thus, the first step in the Section 106 process is to identify the APE of a project and then determine whether a historic boundary of a property falls within this area. Unlike the methods currently employed in the field or proposed in the Draft NPA, the height of the tower and its potential visibility from a distance is irrelevant to determining this APE, except in extreme cases. While this approach incorporates a smaller APE than that considered in the Draft NPA, it is not only an objective and straightforward method, but it is also grounded in the ACHP rules and authoritative guidance of the National Register. As such, the Commission should adopt this approach in the Draft NPA to ensure that the Section 106 review process remains centered on historic preservation and not on mere aesthetics.

V. SHPO Submission Packet Procedures Must Be Clarified and Revised

Joint Commenters recognize that the TWG worked diligently to develop standardized, understandable and user-friendly documentation and packet-submission standards. These standards are reflected in the New Tower Submission Form and Collocation Submission Form included with the Draft NPA (Attachments 3 and 4).

The Joint Commenters urge the Commission to retain both forms, with certain revisions and clarifications to the procedures for the submission.

First, the submission requirements described in Section IV.H. are unclear. This section should be revised to require applicants to submit packets only to those identified Indian tribes and Native Hawaiian Organizations ("NHOs") that are consulting parties, consistent with the procedure set forth in Section VII.A.I. This section obligates the applicant to prepare a Submission Packet and submit it, together with the required documentation, to the SHPO/THPO and all consulting parties, including only those relevant Indian tribes and NHOs.

Second, Section VII.A.4. should be revised to afford applicants as much time as necessary to prepare and resubmit the Submission Packet to the SHPO/THPO. As currently drafted, Section VII.A.4. mandates a 60-day resubmittal period for submission packets returned by the SHPO/THPO. The decision whether to move forward with a project is the applicant's alone to make. Any limit on the period for the resubmission of the packets is unnecessary, as the resulting delay will impact only the party responsible for the delay – the applicant – and it violates the applicant's free will.

Conclusion

For the reasons stated above, Joint Commenters urge the Commission to adopt the Draft NPA, with the modifications and revisions discussed herein.

Respectfully submitted,

WESTERN WIRELESS CORPORATION

/s/
Gene A. DeJordy, Esq.
Vice President of Regulatory Affairs
Western Wireless Corporation
3650 – 131st Ave., S.E., Suite 400
Bellevue, WA 98006
(425) 586-8700

William J. Hackett, Esq.
Director of Regulatory Compliance
Western Wireless Corporation
401 9th Street, N.W., Suite 550
Washington, DC 20004
(202) 654-5980

John F. Clark, Esq.
Zachary A. Zehner, Esq.
Keith R. Murphy, Esq.
Perkins Coie, LLP
Counsel to T-Mobile USA, Inc. and
Western Wireless Corporation
607 Fourteenth Street, N.W., Suite 800
Washington, DC 20005-2011
(202) 434-1637

Dated: August 8, 2003

T-MOBILE USA, INC.

/s/
Thomas J. Sugrue, Esq.
Vice President – Government Affairs
T-Mobile USA, Inc.
401 9th Street, N.W.
Suite 550
Washington, DC 20004

Dan Menser. Esq.
Senior Corporate Counsel
T-Mobile USA, Inc.
12920 S.E. 38th Street
Bellevue, WA 98006-1350
(425) 378-4000

Shannon Reilly, Esq.
Corporate Counsel
T-Mobile USA, Inc.
12920 S.E. 38th St.
Bellevue, WA 98006
(425) 378-5178

Their Attorneys